Filed 4/3/19 Mojave Desert Air Quality Management Dist. v. Super. Ct. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MOJAVE DESERT AIR QUALITY MANAGEMENT DISTRICT,

Petitioner,

v.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,

Respondent;

MICHELE BAIRD,

Real Party in Interest.

E072002

(Super.Ct.No. CIVDS1612449)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Janet M. Frangie, Judge. Petition is granted.

Devaney Pate Morris & Cameron, Jeffery A. Morris, David R. Plancarte, for Petitioner.

No appearance for Respondent.

Kesluk, Silverstein & Jacob, Douglas N. Silverstein, Michael G. Jacob; Srourian Law Firm, Daniel Srourian, for Real Party in Interest.

In this matter, we have reviewed the petition, its exhibits, the response filed by real party in interest (hereafter real party), the reply filed by petitioner and the objection and motion to strike filed by real party. We have determined that resolution of the matter involves the application of settled principles of law, and that the equities favor petitioner. We conclude that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

I.

BACKGROUND

Real party Michele Baird was employed by the Mojave Desert Air Quality Management District (MDAQMD) since about 1994 as the clerk of the board. The air pollution control officer, Eldon Heaston, was her immediate superior. Jean Bracy was director of administrative services and real party's superior. Real party's office was adjacent to Heaston's.

As early as 2013, real party observed that Heaston regularly returned from lunch intoxicated. At times, he was so intoxicated that Bracy had to drive him home in Heaston's MDAQMD vehicle. Around spring 2014, Heaston was "involved in a single vehicle collision" in the MDAQMD vehicle during working hours. Real party alleged that Heaston and Bracy covered up the collision and that damages were paid for with MDAQMD funds, hidden in the budget. Other individuals informed real party of

Heaston's unusual behavior in the form of calls and text messages suggesting his intoxication. In 2014, real party reported and objected to these events to Human Resources and to Bracy, after which she began to experience retaliation. On January 28, 2015, Heaston informed her she had been reassigned to the Operations Department, would report to a new supervisor, and had to vacate her current office. On March 4, 2015, she made a written complaint to the MDAQMD's governing board, complaining of Heaston's drinking and of the retaliation.

MDAQMD then retained outside attorney Jeffrey A. Morris, via its Special District Risk Management Authority (SDRMA), to investigate real party's internal complaint. On March 11, 2015, Morris hired The Titan Group to interview witnesses, etc. The investigation finished May 29, 2015, and a report (the Titan Report) was prepared. Attorney Morris gave a copy of the Titan Report to SDRMA and to special counsel to the MDAQMD governing board.

Real party filed a government tort claim, by counsel (not current counsel), on July 21, 2015, with MDAQMD. On July 29, 2016, she filed her original complaint. The operative second amended complaint was filed on or about March 1, 2017. Real party sought production of the Titan Report and deposition of MDAQMD's in-house counsel, attorney Karen Nowak, on the issue of the Titan Report. Following briefing, hearings, and the trial court's *in camera* review of the report, the trial court granted the motion to compel on January 11, 2019, giving petitioner 10 days to seek writ relief. This petition was filed January18, 2019. We stayed proceedings and invited a response.

II.

DISCUSSION

Petitioner seeks the issuance of a writ of mandate directing respondent superior court to vacate its January 11, 2019 order compelling production of the Titan Report to real party and requiring Ms. Nowak to sit for deposition regarding the Titan Report. A trial court's determination of a motion to compel discovery is reviewed for abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (*Costco*).) Mandamus may be issued to respondent to "compel the performance of an act which the law specially enjoins." (Code Civ. Proc., § 1085, subd. (a).) The conditions for issuance of a writ of mandate include (a) a clear, present, and usually ministerial duty on the part of the respondent; (b) a clear, present, and beneficial right in the petitioner, to the performance of that duty. (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.)

Here, the trial court found that "the dominant purpose of the investigation conducted by Defendants through the Morris Firm and the Titan Group was to investigate an employee's multiple complaints concerning employees of Defendant. It was not for the purposes of litigation." But, the dominant purpose of the *investigation* or a *document* is not the nature of the test for attorney-client privilege. Instead, "[t]he party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship." (*Costco, supra*, 47 Cal.4th at p. 733; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37,

49 (*Clark*).) The proper procedure for the trial court would have been to first determine the dominant purpose of the relationship between MDAQMD/SDRMA and attorney Morris (who hired The Titan Group to assist with the investigation). The superior court's order on plaintiff's motion to compel does not indicate that the court conducted an analysis of the relationship, only of the investigation and the Titan Report itself.

The trial court cited the Titan Report (reviewed *in camera* at Morris's request; see *Clark, supra*, 196 Cal.App.4th at p. 51, quoting *Costco, supra*, 47 Cal.4th at pp. 739-740), that the investigator noted the purpose of the report is to conduct a fair and impartial analysis of statements and evidence related to real party's allegations; the investigation is directly due to real party's written complaint and allegations; and its scope is to determine by a preponderance of the evidence if the allegations are sustained. Yet, the very "statements and evidence" related to real party's allegations form a typical basis to create an anticipation of litigation. (*County of Los Angeles v. Superior Court* (2005) 130 Cal.App.4th 1099, 1105 [" 'pending litigation' " includes where existing facts and circumstances indicate a significant exposure to litigation].) Here, these "statements and evidence" include real party's lengthy recitation of the allegations of Heaston's frequent inebriation (while driving the agency vehicle), her interaction with Heaston and Bracy, the retaliation against her, and her explicit statements when seeking an internal investigation that, "I have consulted with an attorney and reserve the right to retain counsel, pending the outcome of the investigation and actions of the Board regarding this matter. In addition, detailed notes, recorded conversations, and other evidence are in my

possession and will be used to substantiate my claims. Witnesses and employees I have spoken with have agreed to provide testimony if they are able to be interviewed and remain anonymous." That suggests an aggrieved individual considering litigation. That Morris was hired after real party submitted her March 4, 2015 internal complaint with these allegations and statements suggests that SDRMA/MDAQMD hired him in anticipation of litigation, and that their *relationship* was one of attorney-client. Moreover, the Titan Report, with Morris's analysis, was attorney work product.

The order compelling production does acknowledge that real party's complaint requests an internal investigation, but that while she consulted an attorney and reserved her rights, no action was pending at that time and the employee manual requires a full investigation of such complaints of violations of company policies in any case. The trial court thus seems to suggest (without an explicit finding) that because no action was pending, litigation was not anticipated, and the report was not subject to privilege. But, even if a communication "may not have been prepared in anticipation of litigation is of no consequence; the privilege attaches to any legal advice given in the course of an attorney-client relationship. [Citations.]" (*Costco*, *supra*, 47 Cal.4th, at p. 733.) Similarly, "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) . . . (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to . . . the Code of Civil Procedure," with certain exceptions not pertinent here. (Civ. Code, § 47, subd. (b).) Here, the Titan Report was commissioned by counsel hired for the purpose of

investigating real party's allegations and was submitted confidentially by counsel to SDRMA and special counsel to MDAQMD.

The trial court also found, in a somewhat conclusory fashion, that "[e]ven if the attorney-client or attorney work-product privilege was applicable, it was implicitly (if not expressly) waived." The trial court cites no authority for an implicit waiver, but states that petitioner's Seventeenth Affirmative Defense "that all conduct attributed to it was conducted in good faith" means that real party "has a right to see how the investigation was conducted to make her own determination" of good faith. Yet, case law acknowledges three methods for waiving attorney-client privilege: (1) disclosing a privileged communication in a nonconfidential context; (2) failing to claim the privilege in a proceeding in which the holder has the legal standing and opportunity to do so; and (3) failing to assert the privilege in a timely response to an inspection demand. (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1126.) None of these appear to apply here. Additionally, petitioner is not putting the Titan Report directly at issue respecting real party's whistleblower claims. In fact, petitioner offered to provide witness statements from the investigation, but not the entire Titan Report, which was refused.

In this light, the trial court should not have compelled production of the Titan Report, nor the deposition of Ms. Nowak on the issue of the Titan Report. Accordingly, we have determined that the trial court abused its discretion in compelling production, and that the petition should be granted.

III.

DISPOSITION

Let a peremptory writ of mandate in the first instance issue, directing the Superior Court of San Bernardino County to vacate its order of January 11, 2019, compelling production in San Bernardino Superior Court case No. CIVDS1612449, and to proceed consistent with this opinion. Real party's Objection and Motion to Strike Petitioner's Reply is OVERRULED and DENIED. (Cal. Rules of Court rule 8.487(b)(3).) The temporary stay imposed by this court on January 18, 2019, is LIFTED. Petitioner is awarded its costs.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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RAMIREZ
P.J.

We concur:

FIELDS
J.

RAPHAEL
J.